



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Earle Palmer Brown Companies, Inc.--
Reconsideration

File: B-243544.3

Date: March 2, 1992

Gary F. Jonas for the protester.
Scott T. Kragie, Esq., Squire, Sanders & Dempsey, for
J. Walter Thompson U.S.A., Inc., an interested party.
George N. Brezna, Esq., United States Marine Corps, for
the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. General Accounting Office will not consider, upon request for reconsideration, new arguments and information that the protester could have raised during the original protest.
2. Request for reconsideration of decision is denied where the protester essentially only restates its initial arguments and expresses disagreement with the decision.

DECISION

Earle Palmer Brown Companies, Inc. (EPB) requests reconsideration of our decision in Earle Palmer Brown Cos., Inc., 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134, in which we denied its protest of the award of a contract under request for proposals (RFP) No. M00027-90-R-0010, issued by the United States Marine Corps for recruit advertising services. In its initial protest, EPB principally contended that the agency unreasonably awarded a contract to the incumbent, J. Walter Thompson U.S.A., Inc., at a higher cost than the protester had proposed.

We deny the request for reconsideration.

On June 25, 1990, the agency issued the solicitation for a cost-plus-fixed-fee contract for the creation and production of advertising to encourage recruitment in the Marine Corps. The solicitation reserved to the agency the right to adjust offerors' proposed prices for cost realism and provided

for a cost/technical trade-off using the method referred to as Greatest Value Scoring (GVS). Under GVS, the agency assigned point values to technical and cost factors and derived a total combined point score for the purpose of determining which proposal was most advantageous to the government.

Although the agency's technical panel recommended award to the incumbent, based on its technical superiority, the agency's initial calculation of total GVS scores indicated that the protester, whose proposal the panel had also rated as excellent, had an advantage overall because of its much lower proposed cost. Nevertheless, review of the protester's cost proposal raised several concerns. The contracting officer subsequently adjusted the protester's cost upward to reflect the likelihood that the protester would have to pay higher salaries than proposed to attract key personnel identified as district representatives with the qualifications proposed in its best and final offer (BAFO).

The upward adjustment of the protester's cost resulted in a slight increase in the incumbent's cost score, giving Thompson a higher total GVS score, despite the protester's high technical rating and low cost, owing primarily to the advantages that the technical panel found in Thompson's technical proposal. On March 27, 1991, after a briefing from the technical panel as well as the contracting staff, and a review of the technical proposals and the narrative comments of the technical panel, the source selection authority (SSA) selected the incumbent for award, based on his determination that the awardee's proposal offered considerable technical advantages justifying the additional expense.

In its original protest, EPB argued that the cost realism adjustment made to its proposal was unreasonable because it failed to take into account the differences between the proposals and circumstances of the two offerors. The protester contended that the agency should not, in any event, have adjusted its proposed cost for district representative salaries without first raising the matter in discussions. The protester also argued that the two proposals were substantially equal in technical merit and the incumbent's proposal contained no technical advantage meriting the payment of the additional cost involved.

We found that the agency was reasonably concerned about the protester's ability to perform in accordance with its proposed cost, based on its low district representative salaries. We found that the agency reasonably determined that the protester was likely to incur costs higher than it proposed and acted properly in adjusting the protester's

proposed cost upward, to reflect the probable cost of performance employing district representatives with the qualifications proposed in EPB's BAFO. We found the amount of the adjustment reasonable.

The record showed that in requesting EAFOs, the agency modified the solicitation to base the cost evaluation on a specified number of hours, where the solicitation had previously allowed each offeror to propose its own estimated number of labor hours. This modification resulted in a significant reduction in the number of hours upon which the protester based its proposal and was a significant factor in lowering EPB's costs below those of the awardee. We found that where low salaries in the protester's original proposal appeared consistent with an approach using less qualified personnel working a greater number of hours, the agency was not required to discuss the realism of the protester's proposed salaries, since the deficiency became apparent only when the protester submitted a BAFO that proposed higher qualified personnel working a fewer number of hours at the same, or slightly lower, salaries.

Our review of the evaluation documents established that the SSA had a reasonable basis for determining, consistent with the technical panel's conclusions, and notwithstanding the contrary opinion of the contracting officer and the excellence of the protester's proposal, that the incumbent's proposal was decidedly superior in technical merit. Although the panel rated the protester's proposal very highly overall, the SSA noted that the Thompson proposal received higher ratings in the most critical categories--creative, systems, facilities and staffing, and the ability to develop and execute a media campaign directed at the target audience. The protester ranked third in technical quality. The SSA therefore found that despite the overall excellence of the protester's proposal, the awardee's higher technical score represented a real technical advantage for the agency in the most critical areas, consistent with the evaluation criteria. We found this selection decision to be supported by the record, including our own review of the two proposals, and consistent with the factors that the solicitation had established for award.

In its request for reconsideration, EPB argues initially that our Office erroneously found that the protester had proposed enhanced qualifications for district representatives in its BAFO so that the upward cost adjustment to cover the cost of hiring personnel with these qualifications was therefore improper. The protester contends that the district representative qualifications set forth in its BAFO were merely an elaboration of those contained in its initial offer. EPB contends that, if the agency believed that its proposed costs were unrealistic or unsupported, then the

agency should have recognized this from the protester's initial proposal and should have discussed the issue with EPB prior to requesting BAFOs. The protester challenges the agency's determination that its proposed district representative salaries were unrealistic and identifies specific personnel in its employ who, EPB argues, will meet qualifications for district representatives and who will work for the low salaries that the protester has proposed.

Regarding the protester's argument that there was no essential change in the level of personnel initially proposed and that in its BAFO, as we noted in our previous decision, the agency had expressed concern in discussions concerning the lack of experience of the district representatives that EPB initially proposed, and the BAFO proposed hiring personnel with more experience than EPB offered in its initial proposal. The agency increased EPB's technical score for district representation. In the course of the original protest, we viewed the record as establishing that the protester had offered more experienced personnel, in response to the concerns that the agency expressed during discussions. The agency and Thompson argued this was the case. A hearing involving sworn testimony, held at the protester's request, reinforced this view. The awardee, in its comments on the hearing and the agency report, provided a lengthy comparison and analysis pointing out the differences between the qualifications initially proposed and those contained in the BAFO. Although the protester twice submitted supplemental comments attacking other "misunderstandings" contained in the awardee's comments, it never challenged as either unreasonable or incorrect the agency's and the awardee's assertion that the protester had responded to the agency's concerns by increasing the proposed district representative qualifications.

The argument that the agency should have recognized any problem in the realism of the district representative salaries from the initial proposal is no more than an indication of disagreement with our original decision, where we found that the initial low salaries proposed were consistent with the protester's approach in its original proposal, which was based on accomplishing the work with less experienced personnel working more hours. In view of the evidence that the protester's BAFO constituted a revision of the proposed district representative qualifications from its initial proposal, and absent any argument to the contrary, we could not find that the agency failed to fulfill its obligation to conduct meaningful discussions because it did not question the low salaries contained in the original proposal. Where a problem only appears upon

review of an offeror's BAFO, there is no obligation to conduct further discussions. See Addsko Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317.

Regarding the protester's offer of proof that there are specific personnel in its employ who meet the qualifications for district representative and who will work for the salaries proposed in its BAFO, our Office will not consider, at this late date, such new arguments and information that should have been raised in the original protest. Source AV Inc., B-244755 et al., Sept. 10, 1991, 91-2 CPD ¶ 237; Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546. The agency and the interested party submitted evidence that the protester had been unsuccessful in its attempts to obtain commitments from experienced personnel at the salaries proposed. The protester never attempted in the original protest proceeding, in which the question of the availability of qualified personnel to EPB at its proposed salaries was raised repeatedly by the agency and awardee, and discussed at the hearing, to refute with specific evidence the agency's position that EPB would not be able to provide personnel with the qualifications proposed in its BAFO without increasing salaries to the level paid by Thompson and other advertising agencies for similar services. At that time, the protester could have but did not identify personnel who would actually perform the work at the salaries specified in its BAFO.

The protester provides no explanation of why it did not earlier dispute the agency's conclusion that EPB's BAFO contained enhanced qualifications, nor does the protester provide any reason for not previously identifying specific personnel that it can employ or has employed and who meet the qualifications for district representatives. We see no basis for modifying our original conclusion that the agency had a reasonable concern that to perform as it proposed, the protester would have to pay higher salaries than anticipated so that the cost adjustment was both proper and reasonable.

Regarding the award decision, the protester contends that we erred in stating that EPB had conceded that a substantial portion of the \$2.5 million cost difference between its proposal and the Thompson proposal was attributable to the greater experience and expertise of the incumbent's personnel. In its protest, EPB argued that of \$1.8 million in additional direct labor costs, which the SSA considered in concluding that the technical advantages of the Thompson proposal justified the additional expense that the agency would incur by accepting that proposal, approximately \$1 million constituted secretarial labor. EPB argued that the SSA should have recognized that this \$1 million extra for secretarial labor will confer no technical benefit upon the agency; thus, the protester argues, only \$800,000 of

Thompson's price is attributable to its more experienced personnel. We considered this argument previously and concluded that \$800,000, nearly one-third of the difference in cost, was a substantial portion of the difference in cost between the two proposals. EPB basically disagrees with our finding. Such a disagreement does not provide a basis for reconsideration. R. E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

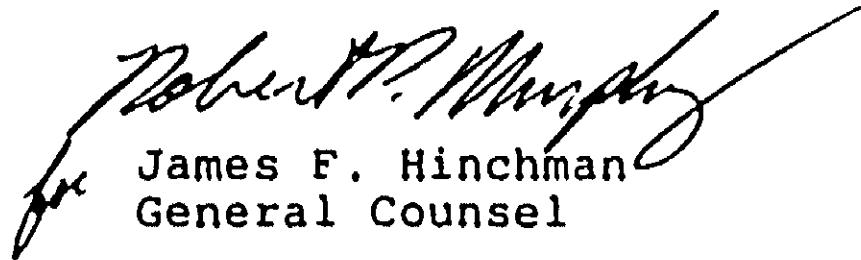
EPB also raises several additional issues--for example, the protester challenges the make-up of the technical panel and alleges that Thompson gained an unfair competitive advantage when the Corps approved a new advertising campaign ("Chess Board") under the incumbent contract during the course of the procurement. Regarding "Chess Board," the record shows that the protester took issue with the agency's approval of "Chess Board" at the postaward briefing on April 9, 4 days after filing its protest with our Office. Although the protester did file a supplemental protest concerning other issues, it did not raise the "Chess Board" issue for nearly 2-months until our Office, having reviewed the debriefing notes, brought it up at the hearing. At that hearing, the agency and the awardee specifically asserted that the approval of "Chess Board" was beyond the scope of any of the protest issues. The protester did not argue otherwise, and although it did pursue the issue belatedly in its comments, there was ultimately no opportunity to develop the factual record on the issue. Further, despite arguments that the approval of "Chess Board" gave the awardee valuable insight into the Corps' advertising philosophy, the protester does not identify specific ways in which "Chess Board" departs from the philosophy behind the "Sword" and "Knight" campaigns, which were a matter of public knowledge and from which "Chess Board" evolved.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2)(3) (1991), a protest must be filed in writing with either our Office or the contracting agency within 10 working days after the basis of protest is known. The protester's attempts, in its comments and now upon reconsideration, several months after it knew of the basis for protest, to argue issues concerning the competitive advantage gained by Thompson through its knowledge of the Corps' approval of a new advertising campaign, are clearly untimely. Similarly, the protester never challenged the expertise of the technical panel in the course of its protest, and its arguments in this regard are also untimely. In any event, evaluator qualifications are within the contracting agency's sound discretion and do not give rise to review by our Office unless there is a showing of possible abuse of that

discretion. Cajal Defense Support Co., B-237426, Feb. 16, 1990, 90-1 CPD ¶ 286. These issues are not based on new information and should have been raised in the original protest. Department of the Army--Recon., B-237742.2, supra.

The remainder of the protester's arguments essentially restate those already considered in our previous decision. Under our Bid Protest Regulations, a party requesting reconsideration must show that our prior decision contains either errors of fact or law or that the protester has information not previously considered that warrants reversal or modification of our decision. Sigma General Corp.--Recon., B-236870.2, Feb. 23, 1990, 90-1 CPD ¶ 210. The protester here essentially restates the arguments previously considered and expresses its disagreement with our findings, but we find nothing in EPB's submissions that would warrant reversal or modification of our previous decision.

We deny the request for reconsideration.


for James F. Hinchman
General Counsel